

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
	:	CASE NO. CA2014-07-054
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
	:	3/23/2015
- VS -	:	
	:	
LUTHER E. SMITH,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2013 CR 000375

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for plaintiff-appellee

Schuh & Goldberg, LLP, Brian T. Goldberg, 2662 Madison Road, Cincinnati, Ohio 45208, for defendant-appellant

M. POWELL, J.

{¶ 1} Defendant-appellant, Luther Smith, appeals his sentence in the Clermont County Court of Common Pleas for sexually abusing a teenage female acquaintance.

{¶ 2} Appellant was indicted in June 2013 on three counts of unlawful sexual conduct with a minor and four counts of illegal use of a minor in nudity-oriented material or performance. The state alleged that over a period of several months, appellant engaged in

sexual intercourse with the victim and took explicit photographs of the victim with his cellphone. On September 30, 2013, appellant pled guilty to three counts of unlawful sexual conduct with a minor. On November 15, 2013, following a sentencing hearing, the trial court sentenced appellant to 48 months in prison on each count of unlawful sexual conduct with a minor, and ordered that the sentences be served consecutively, for an aggregate prison term of 12 years.

{¶ 3} Appellant appeals, raising two assignments of error.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY SENTENCING HIM TO CONSECUTIVE PRISON TERMS.

{¶ 6} Appellant argues, and the state concedes, that the trial court erred in imposing consecutive sentences because the trial court failed to make the required findings under R.C. 2929.14(C)(4).

{¶ 7} Pursuant to R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Dillon*, 12th Dist. Madison No. CA2012-06-012, 2013-Ohio-335, ¶ 9. Specifically, the trial court must find that (1) the consecutive sentence is necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) one of the following applies:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or

unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4); *Dillon* at *id.*

{¶ 8} "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry[.]" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 37. A trial court is not required to provide "a word-for-word recitation of the language of the statute" or articulate reasons to support its findings when imposing consecutive sentences. *Id.* at ¶ 29, 37. However, it must be clear from the record that the trial court engaged in the required sentencing analysis and made the findings required by the statute. *Id.* at ¶ 29, 36; *State v. Childers*, 12th Dist. Warren No. CA2014-02-034, 2014-Ohio-4895, ¶ 31.

{¶ 9} We agree with the parties that the trial court failed to make the required statutory findings under R.C. 2929.14(C)(4) before it imposed consecutive sentences. During the sentencing hearing, the trial court merely stated that:

I'm also going to note that the Court has examined everything that is placed on the record, and it's examined [R.C.] 2929.14(C)(4) which sets out the factors the Court -- this Court must consider in relation to if it chooses to impose consecutive sentences in this matter.

The trial court then sentenced appellant to prison terms of 48 months on each count of unlawful sexual conduct with a minor and ordered that the sentences be served consecutively. The sentencing entry likewise fails to set forth the required statutory findings under R.C. 2929.14(C)(4) and instead merely states, "In imposing the consecutive sentences, the Court considered the factors contained in [R.C.] 2929.14(C)."

{¶ 10} It is significant that R.C. 2929.14(C)(4) requires a trial court to "find" that the statutory factors support the imposition of consecutive sentences. By contrast, a trial court need only "consider" the seriousness and recidivism factors before imposing a sentence under R.C. 2929.12. The difference in the language used by the General Assembly in these two statutes indicates a clear legislative intent that a mere consideration of the R.C. 2929.14(C)(4) factors before imposing consecutive sentences does not comply with the statutory mandate to make the required findings.

{¶ 11} Because the trial court failed to make the required statutory findings under R.C. 2929.14(C)(4) during the sentencing hearing at the time it imposed consecutive sentences, and did not incorporate the required findings into its sentencing entry, we find that the trial court's imposition of consecutive sentences is contrary to law. *Childers*, 2014-Ohio-4895 at ¶ 34; *State v. Marshall*, 12th Dist. Warren No. CA2013-05-042, 2013-Ohio-5092, ¶ 8, 25.

{¶ 12} Appellant's first assignment of error is accordingly sustained.

{¶ 13} Assignment of Error No. 2:

{¶ 14} THE TRIAL COURT ABUSED ITS DISCRETION AND IMPOSED A CRUEL AND UNUSUAL PRISON SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶ 15} Appellant argues that given his guilty plea, the fact he "accepted full responsibility for his actions and prevented the victim * * * from having to testify in Court against him," and the fact he had a successful business at the time of the offenses, his 12-year prison sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and is an abuse of discretion.¹ However, given

1. Appellant's brief recites an outdated standard of review. *State v. Johnson*, 12th Dist. Fayette No. CA2013-04-012, 2014-Ohio-1694, ¶ 37. This court no longer reviews felony sentences under an abuse of discretion standard. *State v. Todd*, 12th Dist. Clermont No. CA2014-05-035, 2015-Ohio-649, ¶ 8. Rather, we review felony sentences pursuant to the standard of review set forth in R.C. 2953.08(G)(2) to determine whether the imposition

our decision to remand this case for resentencing, we find that appellant's second assignment of error is moot and we decline to address it. *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶ 29.

{¶ 16} We hereby vacate that portion of the trial court's judgment imposing consecutive sentences and remand this matter to the trial court for resentencing. On remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, shall make the required statutory findings on the record at resentencing and incorporate its findings into a sentencing entry. *Bonnell*, 2014-Ohio-3177 at ¶ 29, 37.

{¶ 17} Judgment reversed and cause remanded to the trial court for resentencing consistent with this opinion.

PIPER, P.J., and RINGLAND, J., concur.

of those sentences is clearly and convincingly contrary to law. *Id.* A sentence is not clearly and convincingly contrary to law where the record supports the trial court's findings under R.C. 2929.14(C)(4) and where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. See *id.* at ¶ 8; R.C. 2953.08(G)(2).